IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1041 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VAJA KHATUBHAI KATRA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1041 of 1994

MS KUSUM M SHAH for Petitioner No. 1

MR KC SHAH,APP for Respondent No. 1

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 18/02/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE KSHITIJ R.VYAS)

1. The appellant in this appeal has challenged the judgment and order dated 19.9.1994 passed in Session Case No.23 of 1992 by the learned Addl. Sessions Judge, Panchmahals at Godhra, convicting him for offence punishable under section 302 of IPC and sentencing him to suffer R.I.for life and to pay a fine of Rs.500/-, in default, to undergo R.I.for two months.

2. As per the prosecution case, the incident in question took place on 19.11.1991 at about 11.00 a.m. when the deceased Gaba Sardar was assaulted by the appellant who caused injury with stone and also pressed the neck of the deceased. While the deceased and his brother Kanti, PW 1 Ex. 14 were busy in their field on the day in question, quarrel with the appellant took place on account of grazing cattles in the field of the appellant. PW 1 Kanti informed his elder brother Shanker Sardar, PW 3 Ex.17 after reaching home who is also the complainant. Thereafter he filed complaint at Khanpur Police Station. P.R.Chauhan, PW 6 Ex.20 PSI of Khanpur Police Station, on the basis of the complaint Ex. 21 filed by the complainant, registered the offence and started usual investigation. After completion of investigation, chargesheet was filed against the appellant. Learned Addl. Sessions Judge, Panchmahals at Godhra framed charge Ex. 3 against the accused who pleaded not guilty to the same and claimed to be tried. The defence of the appellant was of total denial. The learned trial judge, after appreciating the evidence including further statement of the appellant, was of the view that the prosecution successfully established the guilt against the appellant. He, therefore, passed the order of conviction and sentence as stated herein above.

3. Ms.K.M.Shah, learned Counsel appearing for the appellant, after taking us through the entire evidence, submitted that the learned trial judge has committed an error in convicting the appellant. It was contended that there are material contradictions in the evidence of prosecution witnesses and, therefore, no reliance can be placed on their evidence. Learned Counsel submitted that even if the appellant is held to be guilty of causing death of the deceased, in that case also, no offence under section 302 of the IPC can be said to have been committed. In the submission of learned Counsel, the appellant, at the most, can be convicted for an offence punishable under section 304 Part II of the IPC.

4. Mr.K.C.Shah, learned APP supported the judgment of the trial court in toto.

5. In order to bring home the charge, the prosecution, in the instant case, has relied on the evidence of Kanti, PW 1 Ex. 14 who is also the eye witness. Besides the evidence of PW 1, the prosecution has also relied upon the evidence of PW 4 Shanker, the complainant and Koyagar, PW 4 Ex.18 who has supported the oral testimony of PW 1.

6. PW 1 Kanti, in his evidence, has stated that on the day in question, he and his deceased brother had gone to the field for the purpose of watering crops. The field of the accused is adjacent to their field. The wife of the appellant Revaben had tried to pluck crop 'Guvar' from their field. Even though she was prevented by them, she continued to do so. At that time, the appellant came with his cattles and allowed them to graze in the said field. When the appellant was questioned for his act, he replied that the field did not belong to them and thereafter assaulted the deceased with stone. His brother fell down. The appellant thereafter pressed the neck of his brother with his two hands and his brother died there and there. He thereafter shouted for help. On hearing the shouts, Koyagar PW 4 Ex.18 who was repairing the machine in the adjoining field came running. Other persons also came in their field. He tried to give water to his brother. However, he had died. They also sprayed water on the face of the deceased. PW 1 thereafter went to his house to inform his father. This witness was cross examined at length. However, nothing substantial has been brought out by the defence. The defence has brought out certain contradictions from the evidence of PW 1. However, in our opinion, they are quite minor in nature and in any case, will not affect the version of PW 1. According to him, the incident had taken place at 9.00 a.m. He has denied the suggestion that the incident had taken place at about 11.00 a.m. He has been confronted with his police statement in which he has stated that the incident had taken place at about 11.00 a.m. He is also confronted with his earlier statement made before the police wherein he had stated that as the appellant had started giving evasive replies, there were exchange of heated arguments between him and the deceased.

7. Shanker Sardarbhai, PW 3 Ex.17, the complainant, in his evidence, more or less supported the version of the PW 1. According to him, at about 9.00/ 9.15, PW 1 Kanti came to him running and informed him that his brother Gaba was beaten with stone by the appellant. According to him, when he reached the field with his

brother, many persons had gathered. He saw those persons pouring water on the head of the deceased. He had gone to Khanpur police station, about 11/12 k.ms. away, for lodging complaint. In the cross examination, he was confronted about timings i.e. PW 1 Kanti came at about 9.00 or 9.15 a.m. and the persons pouring water on the head of the deceased. In the cross examination, he had admitted that the deceased was in unconscious condition when he reached the field. In the complaint, he has stated that his brother Kanti had come at about 11.00 a.m.

8. Koyagar, PW 4 Ex.18 has also supported the complainant. In his evidence, he has stated that at the time of the incident, he was repairing machine situated in the field of the appellant. According to him, he had gone to repair the machine at about 9.00 o'clock. After about 30/45 minutes, he heard shouts of PW 1 Kanti calling him for help. Accordingly, he rushed and saw that the deceased was lying on the floor and was breathing his last. He tried to make him drink water. However, he could not drink. He poured water on the head of the deceased.

9. Bhathibhai Gemabhai, PW 5 Ex.19 who was also working in the field adjacent to the field of the deceased has not supported the prosecution case and was declared hostile.

10. Reading the evidence of PW 1 Kanti, PW 3 Shanker and PW 4 Koyagar, it is clear that they have specifically involved the appellant in the commission of offence. According to them, the appellant assaulted the deceased with stone. Not only that, he pressed the neck of the deceased when he fell down. True, there are certain discrepancies regarding timing of the incident. However, in our opinion, the same will not come in the way of the prosecution. One should not lose sight of the fact that the prosecution witnesses, in the instant case, are rustic villagers and that they are giving evidence after a gap of about three years and, therefore, obviously, such mistakes are bound to happen. In any case, such discrepancies do not materially change the entire prosecution case. The medical evidence in the instant case also supports the version of prosecution witnesses. Dr. Rakesh R. Vaidya, PW 2 Ex.15, Medical Officer of Govt. Hospital, Khanpur who performed the postmortem of the deceased, found the following external injuries on the person of the deceased.

(1)Abrasion 1/1 cm two in no. in neck lateral to

thyroid cartilage 2" apart.

(2)Contusion of abdominal wall in right lower abdomen extending laterally.

He also found following internal injuries.

Effusion of blood (hematoma) is present in muscles in right lower abdominal wall. Underneath peritonitis (parietal) is congested.

Peritoneal cavity is filled with blood and blood clots.

In the opinion of Dr. Rakesh, the external and internal injuries were corresponding to each other. The external injuries were antemortem. According to doctor, external injury no.2 was possible with muddamal stone. The doctor has opined that the cause of death was syncope due to excessive internal haemorrhage.

11. In view of the medical evidence on record, there is no dispute that the deceased died a homicidal death and the appellant is responsible for causing death with the help of muddamal stone weighing 750 grams. Even though the doctor noticed mark of abrasions on the neck of the deceased, however, no corresponding internal was noticed in the postmortem report and, therefore, it can safely be concluded that the deceased died due to excessive internal haemorrhage.

12. In view of the evidence of prosecution witnesses supported by medical evidence, the only conclusion which is possible is to hold the appellant guilty of causing death of the deceased and we accordingly hold the same.

13. The next question that may arise is as to what offence the appellant has committed. The incident in question admittedly has taken place when the appellant tried to encroach upon the field the deceased by allowing his cattles to graze. There appears to be some exchange of heat arguments. The appellant thereafter lost control over himself and attacked the deceased with stone lying there. Thus, the incident which has taken place is out of trifle issue. We can safely infer that there cannot be any intention on the part of the appellant to commit murder of the deceased. This is particularly in view of the fact that he had assaulted the deceased with the help of stone and caused only one injury and that too, not on the vital part of the body. If at all the appellant wanted to commit murder, he could have used the same stone and inflicted another blow on the other vital part of the body of the deceased. Even if we accept the

version of prosecution witnesses that the appellant pressed the neck of the deceased, we do not find any internal injury corresponding pressing of neck.In any case, the pressing of neck is not shown to be one of the causes of death as per medical evidence. The appellant has used stone weighing 750 grams and without there being any intention on his part to commit murder of the deceased as can be seen from the surrounding circumstances, at the most, it can be inferred that the appellant had a knowledge that his act may result into the death of the deceased. In such circumstances, we are of the opinion that the learned trial judge was in error in convicting the appellant for offence punishable under section 302 of IPC. We, therefore, set aside the order of conviction passed by the learned trial judge convicting the appellant for offence punishable under section 302 of IPC. We, however,convict the appellant for offence punishable under section 304 Part II of the IPC.

14. Mr. Shah, learned APP, after taking instructions from the jail authorities, submitted that the appellant, by this time, has already undergone about six years of actual imprisonment. In this view of the matter, in our opinion, the punishment that can be imposed upon the appellant is the sentence undergone by him.

15. In the result, this appeal is partly allowed. The order of conviction and sentence passed by the learned Addl. Sessions Judge, Panchmahals, at Godhra dated 19.9.1994 in Sessions Case No.23 of 1992 is set aside. The appellant is, however, convicted for an offence punishable under section 304 Part II of the IPC and is sentenced to suffer R.I. already undergone. The appellant- accused be set at liberty forthwith if not required in any other case. Order accordingly.

(Kshitij R.Vyas,J.)

(Akshay H.Mehta,J.)

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